89-1060

No. 89-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DARRELL LEDSOME,
Petitioner,

v.

U-BRAND CORPORATION, FOUNDRY DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ASHLAND COUNTY, OHIO, FIFTH APPELLATE DISTRICT

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December, 1989

QUESTION PRESENTED*

Is an employee who alleges a violation of a collective bargaining agreement and exhausts the grievance procedure without obtaining a final and binding result because the agreement neither requires the employer to submit to binding arbitration nor makes the employer's decision final, barred from suing his employer for breach of the agreement unless he can show that his union breached its duty of fair representation in the grievance procedure?

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* All parties in the courts below are listed in the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

DARRELL LEDSOME,
Petitioner,

v.

U-BRAND CORPORATION, FOUNDRY DIVISION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ASHLAND COUNTY, OHIO, FIFTH APPELLATE DISTRICT

Darrell Ledsome petitions the Court to grant a writ of certiorari to review the decision of the Court of Appeals of Ashland County, Ohio, for the Fifth Appellate District, which affirmed the dismissal of his action for failure to state a claim upon which relief could be granted.

OPINIONS BELOW

The opinion of the court of common pleas is unreported, and appears at pages 5a to 14a of the Appendix ("App. 5a-14a"). The opinion of the court of appeals is also unreported and is set forth at App. 1a to 4a.

JURISDICTION

The Supreme Court of Ohio refused to certify this case for appeal on October 18, 1989. App. 20a. This Court has jurisdiction of this case under 28 U.S.C. § 1257.

STATUTE INVOLVED

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, provides as follows:

> (a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties...

STATEMENT

When this case arose, petitioner Darrell Ledsome worked on the assembly line in the pipe fitting and valve manufacturing plant of respondent U-Brand Corporation in Ashland, Ohio. Respondent's employees are represented in collective bargaining by Local 258 of the International Molders and Allied Workers Union, and are covered by a collective bargaining agreement ("CBA") which protects them against discharge so long as they maintain "good behavior, efficiency and honesty." Article IV, Section 2. App. 25a. The CBA also contains a grievance procedure which requires the company and the union to participate in several "steps" to resolve disputes under the CBA. Specifically, those steps involve meetings between company and union representatives of increasing status to attempt "in utmost good faith" to settle all grievances. Article III, Section 1. App. 21a-22a. If the matter cannot be

settled in this manner, then it may be submitted to arbitration, but only if both the company and the union agree to do so. *Id.*, App. 22a.

The CBA provides that any "amiable settlement and adjustment" under these procedures will be "binding upon all parties." *Id.*, App. 23a. The CBA makes clear, however, that if the parties are unable to settle the grievance without arbitration, and if one of the parties refuses to arbitrate the matter, the dispute remains open, and the parties retain the right to use economic weapons (*i.e.*, a strike or lockout) to resolve it. *Id.*, App. 21a. The CBA does not specify whether rights under the CBA may also be enforced in court if no settlement is reached.

On March 9, 1988, respondent discharged petitioner for possessing, using, and reporting for work under the influence of alcohol and marijuana. Petitioner denied these charges, and his union pursued a grievance on his behalf, contending that the alleged violation did not occur and hence that his discharge was a violation of the CBA. After the grievance proceeded through the steps of the grievance procedure without resulting in an amiable settlement, the company refused the union's request to arbitrate the case.

Petitioner then filed this suit against respondent in the Court of Common Pleas for Ashland County, Ohio, alleging that respondent had violated the CBA by firing him. Respondent moved to dismiss for failure to state a claim because petitioner did not allege that his union had breached its duty of fair representation ("DFR") in the course of the grievance procedure. Petitioner, in turn, argued that although an employee is required to show a breach of the DFR either to excuse his failure to exhaust a grievance procedure when required by the CBA, or in order to avoid the binding character of an arbitral determination following exhaustion of the grievance procedure, that requirement did

not apply in his case because he had exhausted the grievance procedure without reaching either arbitration or any other form of final and binding decision.

The court of common pleas, however, dismissed petitioner's claim for failure to allege a breach of the DFR. It concluded that, although an employee could sue if the CBA expressly permitted such litigation, absent such an express reservation of the right to sue, the CBA must be construed to forbid such claims. App. 10a. The court relied on a decision of the Sixth Circuit that had so held, *Fortune v. Lear Siegler*, 684 F.2d 374 (6th Cir. 1982), although it recognized that the holding in that case was "in direct conflict" with a decision of the Ninth Circuit. *Dickeson v. DAW Forest Products*, 827 F.2d 627 (9th Cir. 1987). App 11a-12a.

Petitioner appealed the dismissal to the Court of Appeals for Ashland County, Fifth Appellate District, which affirmed for the reasons stated by the court of common pleas. App. 4a. Petitioner then sought review in the Ohio Supreme Court, but that court denied review. App. 20a.

REASONS FOR GRANTING THE WRIT

Review Should be Granted to Resolve a Growing Conflict Among the Courts of Appeals and the State Courts About an Important Question of Federal Law.

Review should be granted in this case because the court below misread this Court's holdings in decisions that were intended to encourage unions and employers to channel their disputes into arbitration procedures, and applied them in a manner that encourages unions and employers to resolve their disputes by economic warfare instead of by

peaceful means. This case involves those CBAs that do not require arbitration to resolve disputes which arise during the course of the contract, and that allow unions to strike and employers to lock out their employees when a settlement short of arbitration cannot be reached voluntarily. There is a substantial and growing disagreement among the federal and state courts about whether such CBAs thereby *limit* the parties to economic warfare, or also permit them to seek enforcement in court. This controversy has now developed to the point where resolution by this Court is necessary.

It has long been held that CBAs may be enforced in federal or state courts, which are required to follow principles of federal law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). However, this Court has also insisted that the enforcement of the rights granted by the CBA must normally be accomplished by means consistent with those prescribed in the CBA. Thus, if the CBA provides a grievance procedure, a union, company, or employee must first try to pursue the grievance procedure in the CBA in an effort to resolve the dispute. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). If the CBA requires the parties to arbitrate their differences when they cannot reach agreement, then a party cannot unilaterally refuse to participate in the arbitration and instead file suit or use economic weapons, such as a strike. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970). Moreover, there is a presumption that the CBA requires arbitration of a particular dispute, *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), and if the losing party seeks review of a decision following such arbitration, the decision

may be overturned on only the narrowest of grounds. *E.g.*, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Employees as well as unions have standing to enforce CBAs when their rights have been violated. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). However, employees must comply with the same requirements of exhaustion of the grievance and arbitration procedures as the union and the employer, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and they are subject to the same strictures with respect to finality. *Vaca v. Sipes*, 386 U.S. 171 (1967). Moreover, most CBAs make the union the "owner" of the rights enjoyed by the employees under the CBA. Accordingly, the union has substantial discretion over which grievances should be processed, and the employee cannot insist that the union process any particular grievance. Thus, if the union refuses to process a grievance or to demand arbitration under a CBA that prescribes that enforcement procedure, the employee must accept the union's decision not to proceed and cannot sue the employer simply because the union has refused to exercise its discretion to process a grievance, or has pursued the grievance to arbitration but handled it in a way that the employee did not approve. The principal exception to this general rule allows the employee to sue when the union breached its duty of fair representation by refusing to exhaust the grievance procedure or by its conduct of the arbitration on the employee's behalf. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

The majority of CBAs are directly covered by the precedents described above. However, the finality of the grievance and arbitration procedure is a matter of contract; it is not imposed on the parties by substantive federal law.

See DelCostello v. Teamsters, 462 U.S. 151, 164 (1983) (employees are bound "according to the finality provisions of the agreement"). There are a significant minority of CBAs, like the CBA at issue in this case, that do not obligate the union and employer to arbitrate grievances when they remain at odds over a particular dispute after the last step of the grievance procedure. In those cases, if a voluntary settlement cannot be achieved through the grievance procedure, the parties remain free to use other means to compel the other side to yield. Those CBAs normally exclude such disputes from the coverage of the no-strike clause, so that, once the parties exhaust the grievance procedure, they are free to strike or lock out in order to impose their will. But such CBAs are normally silent on the question of whether some means other than a strike, such as a lawsuit, may be employed to enforce the rights that they have created.

Most courts have held that suits may be brought by any aggrieved party — union, employer or employee — where the CBA is silent on the question of whether it may be enforced in court.[1] A distinct minority of courts, joined by the courts below in this case, have ruled that unless the contract expressly reserves the right to sue, the parties to the CBA may resort only to economic action if they cannot agree on the resolution of the grievance, and an employee is precluded from suing unless he can show that the union

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[1] *E.g., Dickeson v. DAW Forest Products*, 827 F.2d 627 (9th Cir. 1987); *Smith v. Kerrville Bus Co.*, 748 F.2d 1049 (5th Cir. 1984); *Associated Gen. Contr. v. Illinois Conf. of Teamsters*, 486 F.2d 972 (7th Cir. 1973); *Carpenters v. Hensel Phelps Constr. Co.*, 376 F.2d 731, 737 (10th Cir. 1967); *Allied Workers v. Ethyl Corp.*, 341 F.2d 47, 49 (5th Cir. 1965); *Nelms v. Gold Kist*, 121 LRRM 3183 (N.D. Ala. 1986); *Breish v. Ring Screw Works*, 397 Mich. 586, 248 N.W.2d 526 (1976).

breached its DFR by refusing to strike.[2] Some courts have adopted an intermediate position under which, if the CBA describes management's responses during the grievance procedure as "final," but permits the union to take strike action if it is dissatisfied with that response, the parties are presumed to have intended to forbid litigation.[3] In effect, in these courts the use of the word "final" is deemed a term of art for forbidding suit. Those cases would not bar suit here, of course, because the CBA only describes "amiable settlements" reached through the grievance procedure as being final between the parties.

The lower federal and state courts have amply aired their views on this issue, and the continuing disagreement among the courts about the possibility of judicial recourse has increased uncertainty among unions, employers and individual employees about the legal ramifications of their collective bargaining relationships. The question is thus ripe for this Court's review, and this case cleanly presents the issue.

The court below, and the courts which it followed, have badly misunderstood the rationale for the requirement that a breach of the DFR be shown before individual employees may sue to enforce their rights under a CBA. What those courts have overlooked is that use of the DFR as a screening device arose against the background of a doctrine that strongly encouraged the parties to CBAs to use arbitration and similar peaceful means to resolve their disputes about those CBAs. In these cases, both unions and employees were barred from suit, not simply to protect

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[2] *E.g., Groves v. Ring Screw Works*, 882 F.2d 1081 (6th Cir. 1989); *Fortune v. Lear Siegler*, 684 F.2d 374 (6th Cir. 1982).

[3] *Huffman v. Westinghouse Elec. Corp.*, 752 F.2d 1221 (7th Cir. 1985); *Haynes v. U.S. Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966).

the courts from being clogged with litigation, but as a way of channeling disputes into the grievance and arbitration procedure where they could be resolved peacefully instead of through a strike. Here, the union requested arbitration, and the employer refused to proceed with it. Here, the union did all that it could legally do for petitioner short of starting a strike and keeping the picket line up as long as necessary to compel his reinstatement. Surely, it makes no sense to require an employee who seeks no more than to show that his individual rights under the CBA were violated to put his union on trial for violating its DFR by refusing to call a strike of the entire workforce.

As a general rule, contracts convey legally enforceable rights and duties, and the normal means of resolving disagreements about whether those rights and duties have been violated is by going to court. Labor contracts, unless they have arbitration clauses, are no exception. Indeed, the National Labor Relations Act was passed precisely to encourage "friendly adjustment of industrial disputes," Section 1, 29 U.S.C. § 151, and to encourage the parties to enter into "written contract[s]" incorporating their agreements on the terms and conditions of employment, so that disputes would be channeled into such peaceful means of resolution. Section 8(d), 29 U.S.C. § 158(d). *See also H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). What is more, Congress enacted section 301 because it was concerned that the parties were violating their agreements and that suits in state court had not provided an effective way to see that the agreements were honored instead of having each dispute settled by a strike. Section 301 was intended to remedy this problem by ensuring that the obligations imparted by the written agreements encouraged by the Act would be enforceable in court. That objective is hardly advanced if, after an employer agrees to be bound by a

written agreement with a union, it may nevertheless flaunt its refusal to abide by the agreement by making the union strike every time there is a dispute about whether the employer has complied with its duties under the CBA.

As then-Circuit-Judge Stevens explained in *Associated General Contractors*, *supra*, a rule that prevented the parties from bringing suit unless the right to sue was expressly reserved would have the effect of "compelling the parties to use force instead of reason in resolving their differences." 486 F.2d at 976. Yet the compelled use of force, or abandonment by one side of the rights which it obtained in bargaining for an agreement, is the result of the ruling below. Far from presuming that suit is forbidden, the proper result would require that CBAs without mandatory arbitration contain clear language stripping the parties of the right to sue before access to the courts is denied. *Id.* The Court should grant review in this case to re-establish the primacy of peaceful rather than hostile means of resolving labor disputes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1989

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DARREL LEDSOME	:	JUDGES :
	:	
Plaintiff-Appellant	:	Hon. Norman J. Putman, P.J.
-vs-	:	Hon. John R. Milligan, J.
U-BRAND CORPORATION, FOUNDRY DIVISION	:	Hon. W. Scott Gwin, J.
	:	Case No. CA-922
	:	
Defendant-Appellee	:	*OPINION*

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas Case No. 33814

Judgement: Affirmed

Date of Judgement Entry: District Court of Appeals 89 JUN 27 AM 8:32

JUANITA WRIGHT
CLERK OF COURTS
ASHLAND CO. OHIO

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PUTMAN, P.J.

This is an appeal from a judgment dismissing appellant's complaint pursuant to Civ. R. 12(B)(6).

Appellant appeals raising the following sole assignment or error:

ASSIGNMENT OF ERROR

> BECAUSE PLAINTIFF-APPELLANT'S COMPLAINT IS NOT BARRED BY FEDERAL LABOR LAW, THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS.

For the reasons stated below, appellant's assignment of error is overruled.

The record reflects that the appellant worked for appellee from August 25, 1987, until he was discharged on March 9, 1988, for possession or alcohol and marijuana on company property, abuse of alcohol and marijuana on company property, and reporting for work under the influence or alcohol and/or marijuana, all of which were violations or U-Brand's rules concerning safety, conduct, attitude and disobedience.

At all relevant times, appellee-company was an employer in an industry affecting commerce as defined in §§ 501(1) and (3) of the Labor Management Relations Act, 29 USC, §§ 142(1) and (3), and § 502(2) of the act, 29 USC § 152(2), and within the meaning of § 301 of the act, 29 USC § 185. Appellant was represented by the International Molders and Allied Workers Union of AFL-CIO, Local 258. The union was the certified collective bargaining representative of the bargaining unit consisting of all

Ashland production and maintenance employees, including appellant, employed in appellee-company's factory.

Appellee-company and the union were parties to a collective bargaining agreement that was in force during all relevant times herein. Under Article 4, § (2) of that agreement, employees were entitled to retain their jobs on the condition of good behavior, efficiency, and honesty. By the terms of the agreement, the company had the right to discharge employees only when they failed to meet the foregoing conditions, subject to the grievance procedure.

Article 3 of the collective bargaining agreement contained a four-step grievance procedure. The grievance procedure does not expressly state that it is the exclusive means or resolving grievances, nor does it expressly state that it is not. The collective bargaining agreement does state that "any amiable settlement and adjustment under any of the foregoing procedural steps shall be binding upon all parties."

The fourth step of the grievance procedure is arbitration, which step is invoked "if mutually agreed upon by the union and the management." Appellant exhausted his rights to grieve under the first three steps of Article 3 of the contract to no avail. As it was permitted to do under the labor contract, appellee-company did not agree to submit appellant's grievance to arbitration.

Thereafter, appellant filed a complaint in the Court of Common Pleas, Ashland County, Ohio, against appellee-company. Appellant's complaint alleged that he was employed by appellee-company and that he was discharged in violation of the collective bargaining agreement. In response, appellee-company filed a motion to dismiss appellant's complaint. The trial court sustained appellee-company's motion to dismiss concluding upon analysis of the relevant law that "an employee who is represented by a

union and whose employment is governed by a collective bargaining agreement which includes a bargained for grievance procedure, generally does not state a claim upon which relief may be granted when he asserts that his employer breached a collective bargaining agreement unless the employee can also establish that his union breached its statutory duty of fair representation to him."
Finding of Fact, Conclusions of Law and Opinion (Dec. 22, 1988), Conclusion No. 6, citing *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 1983. Appellant did not allege that his union breached its statutory duty or fair representation. Additionally, the trial court concluded that "the grievance procedure negotiated by the union and the employer is presumptively the final and exclusive means of achieving redress under the contract unless it expressly states that it is not." Findings of Fact, Conclusions of Law and Opinion, Conclusion 11.

We hold that the trial court properly dismissed the case *sub judice* for the reasons stated in its Findings of Fact, Conclusions of Law and Opinion. We affirm the dismissal upon the authority of *Frye v. U-Brand Corp.*, (N.D. Ohio, March 14, 1989), Case No. CA8-4225(A), and *Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F.2d 374 (6th Cir. 1982).

Based upon the foregoing, appellant's sole assignment of error is overruled and the judgment of the Court of Common Pleas, Ashland County, Ohio, is hereby affirmed.

Milligan, J. and
Gwin, J. concur.

/s/_____
/s/_____
/s/_____
JUDGES

NJP/emc
0619 0621

IN THE COURT OF COMMON PLEAS,
ASHLAND COUNTY, OHIO

88 DEC AM 8:30

JUANITA WRIGHT
CLERK OF COURTS
ASHLAND, OHIO

DARREL LEDSOME — CASE NO. 33814

Plaintiff

vs

U-BRAND CORPORATION, FOUNDRY DIVISION

Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

FINDINGS OF FACT

1. Plaintiff is an individual who resides in Mansfield, Ohio.

2. Defendant, U-Brand Corporation, is a corporation doing business in Ashland County, Ohio. U-Brand is engaged in the manufacture and sale of pipe fittings and valves in interstate commerce and, at all relevant times, was an employer in an industry affecting commerce as defined in Sections 501 (1) and (3) of the Labor-Management Relations Act, 29 U.S.C. Section 142 (1) and (3), and Section 502 (2) of the Act, 29 U.S.C. Section 152

(2), and within the meaning of Section 301 of the Act, 29 U.S.C. Section 185.

3. Plaintiff was employed by U-Brand from August 25, 1987, through March 9, 1988, when he was discharged by Defendant company.

4. During all relevant times, the International Molders and Allied Workers Union of AFL-CIO, Local 258 was a labor organization representing employees in an industry affecting commerce as defined in Sections 501(1) and (3) of the Act, 29 U.S.C. Section 142 (1) and (3), and Section 502(5) of the Act, 29 U.S.C. Section 152(5), and within the meaning of Section 301 of the Act, 29 U.S.C. Section 185.

5. During all relevant times, the Union was the certified collective bargaining representative of the bargaining unit consisting of all production and maintenance employees, including Plaintiff, employed in U-Brand's factory.

6. On June 3, 1985, U-Brand and Local 258 entered into a collective bargaining covering U-Brand's production and maintenance employees, including plaintiff, which agreement was in force during all relevant times.

7. Under Article IV, Section (2) of said contract, employees are entitled to retain their jobs on the basis of good behavior, efficiency and honesty. The Company has the right to discharge employees only when they fail to meet the foregoing conditions, subject to the grievance procedure.

8. Plaintiff was charged by U-Brand on March 9, 1988. The notice of discharge recites the supposed reasons for discharge as possession of alcohol and marijuana on company property, use of alcohol and marijuana on company property and reporting to work under the influence of alcohol and/or conduct, attitude and disobedience. Plaintiff denies that he ever had, used or was under the influence of alcohol

or marijuana on company property at any time during his employment.

9. Subsequent to said discharge, plaintiff exhausted his rights to grieve under Article III of the contract to no avail.

10. Article III of the collective bargaining agreement contains a grievance procedure which includes four steps. The fourth step of the grievance procedure is arbitration, which step is invoked "if mutually agreed upon by the Union and the Management".

11. The grievance procedure does not expressly state that it is the exclusive means of resolving grievances nor does it expressly state that it is *not* the exclusive means of resolving grievances. The contract does state that "any amiable settlement and adjustment under any of the foregoing procedural steps shall be binding upon all parties."

12. As it was permitted to do under the labor contract, U-Brand did not agree to submit plaintiff's grievance to arbitration.

13. Plaintiff commenced this action on September 8, 1988, and U-Brand filed its Motion to Dismiss on October 12, 1988. The matter is now properly before this Court pursuant to Rule 12(b)(6) of the Ohio Rules of Civil Procedure.

CONCLUSIONS OF LAW

1. This action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. As such, this action is governed by federal law, and not state law. (See *Rutledge vs. Dayton Malleable, Inc.*, 20 Ohio App. 3d 229.)

2. Under federal law an employee whose employment is governed by a collective bargaining agreement which does *not* contain a grievance procedure "purporting to restrict access to the courts" may sue the employer directly under Section 301. (See *Vaca v. Sipes*, 386 U.S. 171.)

3. Where the bargaining agreement does contain "grievance, arbitration or other provisions purporting to restrict access to the courts", the employee "is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced". (See *Vaca vs. Sipes*, Supra.

4. Generally speaking, an employee under those circumstances may escape the binding effect of the bargained-for grievance procedure only when the employer has repudiated the contractual grievance procedure or when the employee's grievance has failed because of the "union's breach of its statutory duty of fair representation to the employee". (Again see *Vaca v. Sipes*, Supra and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151).

5. There is no suggestion in this case that U-Brand has repudiated the grievance procedure established in the collective bargaining agreement. Plaintiff himself concedes that he was permitted to "exhaust his rights to grieve."

6. The only other exception to the general rule available to the plaintiff is the exception which arises when the Union breaches its duty of fair representation to its members. As noted above, under federal labor law, an employee who is represented by a union and whose employment is governed by a collective bargaining agreement which includes a bargained-for grievance procedure, generally does not state a claim upon which relief may be granted when he asserts that his employer breached a collective bargaining agreement unless the

employee can also establish that his union breached its statutory duty of fair representation to him. (See *DelCostello v. International Brotherhood of Teamsters*, Supra).

7. Such a civil action is known as a "hybrid" Section 301 action. Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on Section 301 since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the national Labor Relations Act. "The two claims are inextricably interdependent". To prevail against either the company or the Union a plaintiff-employee must not only show that his discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other or both. (See the *DelCostello* case Supra).

8. The claims against the Union and U-Brand are "inextricably interdependent" and a claim against the employer must fail once there is a finding that the Union fairly represented the employee. (See *DelCostello*, Supra.

9. The fact that Plaintiff in this case has no complaint against his Union's representation throughout the grievance procedure is fatal to his claim against the employer. (See *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200 and *Chambers v. United Steel Workers of America*, 589 F. Supp. 39).

10. Plaintiff's suggestion that he is not bound by the law stated above because the contractual grievance procedure permits either party to decline arbitration misses the essential point. The holdings of the Supreme Court are not

based on the fact that those grievance procedures contain arbitration clauses. Rather, the law restricts access to the courts to those persons whose unions have bargained for a non-judicial means of resolving contractual grievances, whether or not that procedure includes arbitration. An employee is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced. Ordinarily, an employee is required to attempt to exhaust any grievance procedure *or* arbitration remedies provided in the collective bargaining agreement. (See *Vaca v. Sipes*, Supra and *DelCostello, Supra*).

11. The grievance procedure negotiated by the union and the employer is presumptively the final and exclusive means of achieving redress under the contract unless it expressly states that it is not. (See *Republic Steel Corp. v. Maddox*, 379 U.S. 650.) The federal rule would not, of course, preclude employee's court suit if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy. Any doubts must be resolved against such an interpretation that individual employees are free to avoid the contract procedure in favor of a judicial suit.

12. The fact that either the Union or the company may decline to arbitrate the grievance has no legal significance where, as here, the parties have abided by the grievance procedure which they have negotiated and which is presumptively final and binding. The fact that the parties have agreed that an "amiable settlement" shall be binding on the parties means nothing more than what it says. In addition to resolving grievances in the formal manner established by the contract, the parties may formally settle a grievance at any step of the procedure but will be bound by any such settlement. Such a clause in no way detracts

from the presumptive exclusivity and finality of the remainder of the bargained-for grievance procedure.

13. Where the parties as here, have negotiated a grievance procedure and where there is no suggestion that U-Brand Company has repudiated that procedure or that plaintiff's Union has failed to represent plaintiff properly, plaintiff may not maintain a Section 301 action against U-Brand Company.

OPINION

In reading Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, the Court notes that Plaintiff has cited *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 for the proposition that a grievance procedure which does not provide for mandatory arbitration of grievances, but which does provide for an economic strike as the only available recourse after a grievance has been denied, permits an aggrieved employee to sue his employer for breach of contract under Section 301 unless the contract specifically and expressly states that the grievance procedure is final and binding. The Court finds that the *Dickeson* decision is in direct conflict with a decision of the Sixth Circuit and is based upon a Seventh Circuit decision which the Seventh Circuit itself has not read so broadly.

In *Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F.2d 374, the Sixth Circuit denied employees access to the federal courts under facts strikingly similar to the case before this Court. In *Fortune, supra*, two discharged employees asserted Section 301 breach of contract claims against their employer, but did not assert any claim against their union. The applicable grievance procedure contained four steps, but did not

provide for arbitration under any circumstances. The Court in the *Fortune* case stated: "the final decision was that of management. . ., the union's only recourse in further prosecuting the grievance would be to strike." With respect to the two plaintiffs, their grievances were denied at each step of the grievance procedure and their union voted not to strike.

Under those facts which are exactly like the facts present in the case at bar, the Sixth Circuit upheld summary judgment in favor of the defendant employer. The Court noted the following:

> "Where the parties have failed to agree upon arbitration as a method of breaking a deadlocked dispute over a grievance, we are cited to no provision of federal law which gives the federal courts the power to make the decision for the parties."

The *Fortune* Court relied in great part on the decision from the Fifth Circuit Court of Appeals, *Haynes v. Pipe & Foundry*, 362 F 2d 414. Here the Court stated the following:

> "Congress explicitly stated, by way of a policy, in Section 203(d) of the Taft-Hartley Act, 29 U.S.C.A. Section 173(d), that in settling grievance disputes, the Act contemplated that the method agreed upon by parties to collective bargaining agreements should be the means of settling such disputes. In suits under Section 301(a) the Supreme Court construed this policy as requiring the Courts to give full play to the means chosen by parties to a

collective bargaining agreement for settlement of their differences."

The Sixth Circuit has thus upheld the position advocated by U-Brand, that is, that the parties, negotiated grievance procedure is deemed to be exclusive and final unless otherwise stated in the contract. The *Fortune* opinion does not turn on the inclusion of a finality provision. No reference is made in the opinion as to whether such a clause even appeared in the contract. Thus, the Ninth's Circuit's decision in *Dickeson* is inconsistent with the controlling authority from the Sixth Circuit expressed in the *Fortune* decision.

Even if the Sixth Circuit authority were not so clearly to the contrary, the Ninth Circuit decision must still be questioned. As an initial matter, it must be noted that the *Dickeson* case was not filed by an employee, but was filed by an employer group which was a direct party to the collective bargaining agreement in question. In addition, unlike the U-Brand grievance procedure, the grievance procedure at issue in *Dickeson* did not provide for arbitration of grievances under any circumstances.

In the case of *Huffman vs. Westinghouse Electric Corp.*, 752 F.2d 1221, the Court noted that "statutory policy" as expressed in Section 203(d) of the Labor Management Relations Act, 29 U.S.C. Section 173(d) makes no mention of arbitration, and that in fact, Congress had refused to prescribe compulsory arbitration as a remedy when enacting Section 203(d).

Moreover, this Court finds that the Supreme Court has consistently construed the policy in Section 203(d) as requiring that the parties be bound by whatever grievance remedies they had negotiated.

After having studied the various cases that have been cited, both by Plaintiff and Defendant in this matter, the Court finds that the Motion of the Defendant to Dismiss the original complaint filed by Plaintiff herein should be sustained and this action should be dismissed for failure to state a claim upon which relief can be granted under Civil Rule 12(B)(6).

Counsel for the Defendant is requested to prepare a Judgment Entry in conformity with the Findings of Fact, Conclusions of Law and Opinion set forth hereinabove.

/s/_____
COMMON PLEAS JUDGE

IN

COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

88 SEP-8 PM 12:01

JUANITA WRIGHT
CLERK OF COURTS
ASHLAND CO. OHIO

Darrel Ledsom	:	
187 Coul Street	:	
Mansfield, Ohio 44903	:	CASE NO. _____
	:	
Plaintiff	:	
-vs-	:	
U-Brand Corporation,	:	*COMPLAINT*
Foundry Division	:	
816 Clark Street	:	
Ashland, Ohio 44805	:	

Defendant

1. Plaintiff is an individual residing in Mansfield, Ohio.

2. Defendant is a corporation doing business within the territorial jurisdiction of the Court. Said defendant is engaged in the manufacture and sale of pipe fittings and valves in interstate commerce and, at all times, was an employer in an industry affecting commerce as defined by sections 501(1) and (3) and (2)(2) of the Labor-Management Relations Act (29 USC sections 142(1) and (3) and 152(2)), and within the meaning of section 301 of said act (29 USC section 185).

3. Plaintiff was employed by defendant from August 15, 1987, through March 9, 1988, when he was unlawfully discharged by defendant, as more specifically alleged below.

4. During all times relevant to this complaint, International Molders and Allied Workers Union of A.F. of L-C.I.O., Local 258, was a labor organization representing employees in an industry affecting commerce as defined in sections 501(1) and (3) and (2)(5) of the LMRA and within the meaning of section 301 of said act (29 USC section 185). During this time said union was the certified collective bargaining representative of the bargaining unit consisting of all production and maintenance employees, including plaintiff, employed in defendant's factory.

5. On June 3, 1985, defendant and Local 258 entered into a collective bargaining agreement covering its employees, including plaintiff, which agreement was in force during the entire period involved herein. Said agreement was entered into for the benefit of the employees in said bargaining unit and plaintiff, as a member thereof, is entitled to the benefits of said agreement and to enforce the provisions thereof. A copy of said contract is attached as Exhibit "A".

6. Under Article 4 section 2 of said contract, employees are entitled to retain their jobs on the basis of good behavior, efficiency and honesty, and the company has the right to discharge employees only when they fail to meet said foregoing conditions, subject to the grievance procedure.

7. Plaintiff was discharged by defendant on March 9, 1988. The notice of discharge recites the supposed reasons for discharge as possession of alcohol and marijuana on company property, use of alcohol and marijuana on company

property and reporting for work under the influence of alcohol and/or marijuana, all of which are violations of safety, conduct, attitude and disobedience. Plaintiff denies that he ever had, used or was under the influence of alcohol of marijuana on company property at any time during his employment.

8. Subsequent to said discharge, plaintiff exhausted his rights to grieve under Article 3 of the contract to no avail.

9. As a result of plaintiff's discharge by defendant in violation of his rights under the collective bargaining agreement plaintiff has suffered damages by the loss of past and future wages in the amount of Eight Thousand and no/100 Dollars ($8,000.00).

10. Plaintiff desires to be reinstated to his former job at defendant company and alleges he is entitled to such reinstatement retroactive to the date of discharge without any break in his seniority.

11. **WHEREFORE**, plaintiff prays:

1. That the Court determine that defendant discharged plaintiff without just cause and breach of his rights under the collective bargaining agreement.

2. That the Court award plaintiff damages in the sum of Eight Thousand and no/100 Dollars ($8,000.00) against defendant.

3. That the Court order defendant to reinstate plaintiff in the job he previously held retroactive to the date of plaintiff's discharge without any breach in plaintiff's seniority.

4. That the Court grant plaintiff other relief as may be equitable in the premises.

Robert Goldberger
Attorney for Plaintiff
Richland County Legal Services
Association
35 North Park Street
Mansfield, Ohio 44902
(419) 526-3911

IN THE COURT OF APPEALS
FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED COURT OF APPEALS
89 JUN 27 AM 8:32
JUANITA WRIGHT
CLERK OF COURTS
ASHLAND CO. OHIO

DARREL LEDSOME	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	
	:	JUDGMENT ENTRY
U-BRAND	:	
CORPORATION,	:	
FOUNDRY DIVISION	:	
	:	CASE NO. CCA-922
Defendant-Appellee	:	

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Ashland County, Ohio, is hereby affirmed.

/s/_____
/s/_____
/s/_____
JUDGES

JUN 27 1989

THE SUPREME COURT OF OHIO

1989 TERM

To wit: October 18, 1989

Darrell Ledsome,	:	
Appellant,	:	Case No. 89-1509
	:	
v.	:	ENTRY
	:	
U-Brand Corp.,	:	
Foundry Division,	:	
Appellee.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Ashland County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Robert Goldberger.

(Court of Appeals No. CA922)

THOMAS J. MOYER
Chief Justice

EXCERPTS OF COLLECTIVE BARGAINING AGREEMENT

ARTICLE III

Grievances

Section (1) Should differences arise between the Company and the Union, or its members employed by the Company, as to the meaning and application of the provisions of this Agreement, or shall differences arise about matters not specifically mentioned in this Agreement, but connected therewith, or should any local disputes of any kind arise, there shall be no suspension of work or slow-down or any strike by the employee or employees on account of any differences, nor any lockout by the Company, until an earnest effort is made to properly and promptly settle any grievance by the following method of procedure.

Step 1 - Between the employee and/or his department committeeman and his foreman. If they are unable to settle the grievance within twenty-four hours, then:

Step 2 - There shall be a meeting between the department committeeman and/or officers of the Union and the aggrieved employee and the Works Manager of the Plant to whom the differences shall be submitted by the Union in writing. If they are unable to effect an amiable settlement of the grievance within forty-eight (48) hours from receipt of greivance in writing from the Union (excluding Saturday, Sunday and Holidays) then:

Step 3 - There shall be a meeting, or meetings, between representatives of the Management and representatives of the Union, including the right of the Union to have present at such meetings a representative of the International Union,

wherein both parties shall, in utmost good faith, attempt to properly settle said grievance.

Step 4 - If the difference or differences are not satisfactorily adjusted in any or all of the above steps within ten (10) working days from the date the grievance was first presented in writing by the Union, the matter may then, if mutually agreed by the Union, and the Management, be submitted to binding arbitration as set forth below:

(a) The Union shall request the Federal Mediation and Conciliation Service to furnish the parties with a list of five (5) arbitrators from which the parties shall elect an impartial arbitrator. After receiving the list, and within seven (7) working days of its receipt, an arbitrator shall be selected by each party striking in turn, one (1) strike at a time, from the list of five (5) names. The Union as moving party shall have the first strike. The name remaining on the list after each party has exercised its strikes shall become the arbitrator.

(b) The expense of the arbitrator, as well as the other joint expenses of holding the arbitration, shall be borne equally by the Union and the Company; however, each party shall bear the expense of its own representative, of its own witnesses, and of preparing and presenting its own case.

(c) The jurisdiction and authority of the arbitrator and his opinion and award shall be exclusively limited to the interpretation of the written provisions of this Agreement. The arbitrator shall have no power to add to, subtract from, or in any way modify the terms of this Agreement. The arbitrator shall have the authority only to interpret and apply the specific provisions of this Agreement which shall constitute the basis upon which his decision shall be rendered.

(d) Failure on the part of any grievant or the Union to strictly abide by the prescribed time limits pertaining to any of the grievants and arbitration provisions of this agreement shall result in the grievance being deemed abandoned. In the event the Company does not answer a grievance within the time indicated, the grievance shall be resolved in favor of the grievant.

(e) Grievances must be initiated within five (5) scheduled working days after the occurrence of the alleged event or be deemed waived.

Section (2) It is mutually agreed by the Company and the Union that any amiable settlement and adjustment under any of the foregoing procedural steps shall be binding upon all parties.

Section (3) Committeemen shall be paid for authorized time spent on grievances, if during regular working hours, under the following conditions:

(a) The total time spent on grievances, exclusive of time spent at grievance meetings with Works Manager, shall not exceed two (2) hours per week per committee member.

(b) Authorized time spent on grievances shall be paid at the rate of average piece work or hourly rate, as the case may be.

Section (4) Time spent by the committeemen upon meetings relating to Company-Union relations, including contract negotiations which are called during regular working hours, and which are called by mutual consent by the Company and the Union, will be paid for at the regular rate of such employee. This provision shall not be

construed as establishing the policy that contract negotiations shall be conducted during working hours.

Section (5) Union officials, members of the committee, and other employees shall report to their foremen when it becomes necessary for them to leave their jobs for the purpose of attending any meeting connected with Management-Employee relations, and they shall make known their destination and report again to their foremen at the time of their return from such meeting.

Section (6) Grievance awards involving monetary considerations to the employees and/or employee shall be made retroactive to the date that the matter was first presented in writing to the Works Manager.

Section (7) No employee covered by this agreement shall be intimidated or discriminated against by the Company for seeking redress or grievance or for serving the Union as an Officer or any capacity as a member of the committee.

Section (8) The Union agrees that there shall be no solicitation for membership in the Union, signing up of members, collection of initiation fees, dues or other assessments, meeting or other business activities of the Union on Company time; provided, however, that this shall not be construed to prohibit casual or personal conversation about the Union and its activities, and provided that this shall not be construed as permitting employees to quit work or delay their work for the purposes of conversations or otherwise.

Section (9) The Union agrees that the Company shall have the right to employ one (1) apprentice for the shop, and one

(1) additional apprentice for each eight (8) journeymen molders and coremakers employed in the shop. The apprenticeship term shall be a period of four (4) years. If the Union cannot furnish journeymen, the Company and the Union shall agree upon a different ratio of apprentices.

Section (10) In case of grievances on short-term molding jobs, the job shall be tagged so that when run again the usual checking procedure will be completed. Any change in rate will be retroactive for the former run.

ARTICLE IV
Discharges

Section (1) In the event that an employee is discharged, he shall be given plain, logical reason for his dismissal in writing, immediately upon his discharge.

A member of the shop committee will be notified of any discharge before the end of the shift where the discharge occurred.

Should it be found upon joint investigation that an employee has been unjustly dismissed, he shall be reinstated with seniority and all other employee rights restored. Further, he shall be reimbursed for all wage loss suffered by him provided, however, that his complaint has been registered by the Shop Committee with Management within a period of four (4) days, (excluding Sundays and holidays) of the date of his dismissal.

Section (2) Employees are entitled to retain their jobs on the basis of good behavior, efficiency and honesty. The Company shall have the right to discipline or discharge any

employee who fails to meet the foregoing conditions and particularly, but without limitation, may discharge employee because of the use of intoxicating liquors during working hours, violation of safety rules, absence without leave, dishonesty, insubordination, habitual neglect or carelessness resulting in damage to company property or equipment, sleeping while on duty, or for any other just cause, subject to grievance procedure.

No. 89-1060

JAN 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

DARRELL LEDSOME,

Petitioner,

v.

U-BRAND CORPORATION, FOUNDRY DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ASHLAND COUNTY, OHIO, FIFTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should an employee be relieved of his obligation to allege a breach of his union's duty of fair representation in order to maintain an action against his employer for breach of a collective bargaining agreement where the agreement contains an exclusive grievance procedure which has not been repudiated by the employer?

STATEMENT OF CORPORATE AFFILIATION

At the time of petitioner's employment, U-Brand Corporation was a wholly-owned subsidiary of Worthington Industries, Incorporated. On January 16, 1990, all outstanding shares of U-Brand Corporation were purchased by Mueller Acquisition Corporation, a wholly-owned subsidiary of Mueller Brass Company, a Michigan corporation. The collective bargaining agreement between U-Brand and petitioner's Union remains in effect.

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No. 89-1060

In The

Supreme Court of the United States

October Term, 1989

DARRELL LEDSOME,

Petitioner,

v.

U-BRAND CORPORATION, FOUNDRY DIVISION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, U-Brand Corporation, Foundry Division, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of Ashland County, Ohio, Fifth Appellate District.

STATEMENT OF THE CASE

Petitioner, Darrell Ledsome ("petitioner"), was employed by U-Brand Corporation, Foundry Division ("U-Brand") from August 25, 1987 through March 9, 1988, at which time he was discharged. The notice of termination stated that petitioner was discharged for possession of alcohol and marijuana on Company property, use of

alcohol and marijuana on Company property, and reporting for work under the influence of alcohol and/or marijuana, each of which violates U-Brand's rules concerning safety, conduct, attitude, and disobedience.

On June 3, 1985, U-Brand and the International Molders and Allied Workers Union of AFL-CIO Local 258 (the "Union") entered into a collective bargaining agreement ("CBA") covering U-Brand's production and maintenance employees, including petitioner. Pursuant to the CBA, employees retain their jobs on condition of good behavior, efficiency, and honesty. The Company has a right to discharge employees for failure to meet those conditions, subject to the grievance procedure.

Article III of the CBA contains a four-step grievance procedure culminating in arbitration "if mutually agreed upon by the Union and the management." The grievance procedure does not expressly state that it is the exclusive means of resolving grievances, nor does it expressly state that it is not the exclusive means of resolving grievances. After discharge, petitioner exhausted his rights to grieve under Article III.

As it was permitted to do under the CBA, U-Brand declined to submit petitioner's grievance to arbitration. Under Article XVI of the CBA, the Union had the authority to call a strike, slowdown, or stoppage of work after the grievance procedure was exhausted. The Union, however, did not do so.

On September 8, 1988, petitioner filed a complaint in the Ashland County (Ohio) Court of Common Pleas against U-Brand. In his complaint, petitioner alleged that

he was employed by U-Brand and that he was discharged in violation of the CBA.

On October 7, 1988, U-Brand served its motion to dismiss, which was granted on January 6, 1989. The trial court concluded that petitioner had failed to state a claim upon which relief could be granted under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because he had alleged neither that U-Brand had repudiated the contractual grievance procedure nor that the Union had breached its statutory duty of fair representation. Petitioner appealed to the Court of Appeals for the Fifth Appellate District of Ohio, which unanimously affirmed the trial court's decision.

Petitioner then filed a Motion to Certify the Record and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. On October 18, 1989, the Supreme Court of Ohio unanimously denied petitioner's motion. Petitioner now seeks review by this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The prior decisions of this Court do not mandate arbitration as a pre-condition for judicial deferral to the negotiated grievance settlement procedures of a collective bargaining agreement.

Petitioner initially argues that review should be granted in this case because the court below has misread this Court's holdings in decisions regarding alternative means of resolving disputes between unions and employers. However, to the extent that petitioner argues

that federal law mandates that final and binding arbitration be included in a dispute settlement procedure in order for courts to defer to such a procedure, then it is petitioner who has misread this Court's prior decisions.

Federal labor law favors private settlement of disputes by a method agreed upon by the parties. Section 203(d) of the Labor Management Relations Act provides that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). The goal of this policy can be met only when "the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). Courts, therefore, should not dictate what form a grievance procedure should take.

Indeed, unless it is explicitly stated to the contrary in a CBA, the presumption is that a contractual method for the settlement of grievances is exclusive, precluding a possibility of employee lawsuits. As this Court stated in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) (quoting *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)):

> A contrary rule . . . has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule

> creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

While "[t]he federal rule [favoring private settlement] would not of course preclude [the employee's] court suit if the parties to the collective bargaining agreement *expressly agreed that arbitration was not the exclusive remedy*," *Maddox*, 379 U.S. at 657-58 (emphasis added), as a general matter, grievance procedures enjoy a presumption of exclusivity and finality.

Given the federal policy favoring non-judicial means of determining contractual grievances, as found in 29 U.S.C. § 173(d) and decisions of this Court such as *Maddox*, any doubt must be resolved against the conclusion that individual employees are free to avoid a contractual grievance procedure in favor of a lawsuit. "Of the three available forums for the resolution of disputes – contractual grievance procedure such has [sic] arbitration, or the court, or the picket line – the Supreme Court has consistently sanctioned the one chosen by the parties in their collective agreement." *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 416 (5th Cir. 1966).

Moreover, in *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221 (7th Cir. 1985), the Seventh Circuit Court of Appeals recognized that arbitration is not a necessary component of any private settlement procedure for an employee to be bound by that procedure. The court of appeals stated therein:

> [S]tatutory policy, as expressed in § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), makes no mention of arbitration,

> and . . . , in fact, Congress had refused to prescribe compulsory arbitration as a remedy when enacting § 203(d). . . .Moreover, the Supreme Court had consistently construed the policy in § 203(d) as requiring that the parties be bound by whatever grievance remedies they had negotiated.

Id. at 1225 (citations omitted).

Petitioner contends that any grievance procedure which does not include mandatory final and binding arbitration is not entitled to application of the exclusivity or finality doctrine. Such a conclusion is contrary to law. Under Section 203(d), parties to a CBA are free to choose their own grievance settlement procedures. Arbitration of disputes is not an essential element of settlement procedures for federal courts to defer to such procedures. Here, U-Brand and the Union agreed to a procedure to resolve employee grievances. This procedure includes arbitration "if mutually agreed upon by the Union and the management." There has been no suggestion that the parties intended to permit employees to utilize the grievance procedure and also to file lawsuits. The petitioner has received all that his Union bargained for.

In order for petitioner to avoid the exclusivity and finality of the agreed upon settlement procedures in this case, he must allege that the employer repudiated the contract or that his Union breached its duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171 (1967). While *Vaca* created a narrow exception to the presumption of exclusivity, the Court there nevertheless affirmed the basic principle that great deference should be accorded grievance procedures in the absence of union misconduct. Here, where petitioner did not allege a breach of his Union's duty of fair representation, the Ohio courts properly dismissed his complaint.

2. The alleged conflict among the courts of appeals and the state courts is not a true or significant conflict and can be reconciled on the factual differences of the cases.

Petitioner argues that the Sixth Circuit Court of Appeals' decisions in *Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F.2d 374 (6th Cir. 1982) and *Groves v. Ring Screw Works*, 882 F.2d 1081, *reh'g and reh'g en banc den.*, 882 F.2d 1081 (6th Cir. 1989), conflict with the decisions of other courts of appeals and state courts. Contrary to petitioner's assertions, the decisions cited by him do not directly conflict with the law of the Sixth Circuit as found in *Fortune* and *Groves*.

The courts below in this case relied on the decision of the Sixth Circuit in *Fortune*. In that case, the applicable CBA did not provide for arbitration. Instead, the union had the right to strike after the exhaustion of the grievance procedure. After the two employees involved in the case had exhausted the grievance procedure and their union declined to strike, the two filed suit in federal court under Section 301. The trial court granted the employer's motion for summary judgment on the grounds that the employees had failed to allege a breach of the duty of fair representation by their union.

On appeal, the Sixth Circuit concluded that the result obtained was final and binding on the parties, thereby precluding an employee lawsuit, even though the parties did not agree to have "final and binding" arbitration as part of the grievance procedure. The Sixth Circuit stated:

> Where the parties have failed to agree upon arbitration as a method of breaking a deadlocked dispute over a grievance, we are cited to

> no provision of federal law which gives the federal courts the power to make the decision for the parties.

Fortune, 684 F.2d at 375. Accordingly, in the absence of an allegation of the breach of the duty of fair representation, the Sixth Circuit found no further recourse for the employee. *See aiso, Vaca.*

The Sixth Circuit reaffirmed its holding in *Fortune* in *Groves*, which involved a CBA materially identical to the one in this case. The court in *Groves* stated:

> The CBAs in these cases did provide for specific grievance procedures, finally including arbitration, if mutually acceptable. Absent arbitration, self-help appears to be the means to resolve an unsettled dispute. In this type of situation our circuit has held that an individual is barred from proceeding under § 301 absent an allegation of lack of fair representation by the union.

Groves, 882 F.2d at 1086-87. The Sixth Circuit has, thus, continued to recognize and has not retreated from the principle that the parties to a CBA must be free to develop their own methods of settling differences and that courts should defer to those methods.

Finally, in an unreported Sixth Circuit decision involving the CBA between U-Brand and petitioner's Union arising out of identical facts, the court unanimously affirmed the trial court's dismissal of the plaintiff-employee's breach of contract claim where he had failed to allege a breach of his Union's duty of fair representation. *Frye v. U-Brand Corp.*, Case No. 89-3324 (6th Cir. Dec. 19, 1989). Page 1a of the Appendix.

Petitioner cites a number of cases for the proposition that where a CBA does not contain a grievance procedure culminating in mandatory arbitration, an aggrieved employee may pursue his claim against his employer in the courts without alleging a breach of the duty of fair representation. Petitioner argues that these cases are in conflict with the decisions of the Sixth Circuit and the courts below in the present case. These cases, however, are distinguishable.[1]

Of the cases cited by petitioner, only the Ninth Circuit Court of Appeals' decision in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), appears not to be as readily distinguishable. The court in *Dickeson* concluded that "when the contract is silent as to whether the grievance procedure is final and the only remedy is to strike, we are very hesitant to conclude that the parties intended that the procedure be final." *Id.* at 629. However, as the trial court in the present case noted, "unlike the U-Brand grievance procedure, the grievance procedure at issue in *Dickeson* did not provide for arbitration of grievances under any circumstances." Page 13a of the Appendix to petitioner's brief. Accordingly, while the court in *Dickeson* may have been justified in refusing to

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[1] The cases upon which petitioner relies are set forth in footnote 1 of his petition. However, none of these decisions involved a CBA containing a detailed four-step grievance procedure specifically culminating in arbitration or a strike. Most contain either no specific grievance procedure at all or only a very general procedure from which it may be implied that the parties did not intend it to be exclusive. *But see Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), discussed in the text, *infra*.

find that the parties intended their procedure to be exclusive and final, no such conclusion is warranted here. If anything, the parties here intended management's decision to be final unless there was mutual consent to arbitration or the Union, failing such consent, could force another result by strike. Given the express provisions of the CBA in this case, it would be illogical to conclude that the parties intended that an employee be able to seek yet another form of redress in the courts.

To the extent *Dickeson* is not distinguishable on the basis suggested here, it is submitted that the case was wrongly decided given this Court's deference to agreed upon grievance procedures. The Ninth Circuit's analysis regarding the parties' intention with respect to finality does not hold up. The resolution of a grievance by a strike is just as final as a resolution by arbitration. The fact is that the *Dickeson* court did nothing more than substitute its dispute resolution procedure for the one which was negotiated by the parties because it did not think the opportunity to strike was a *suitable* final resolution. The Sixth Circuit in *Fortune* and *Groves* declined to engage in such a radical redrafting of the contracts. It is submitted that the Sixth Circuit was right to so decline.

3. Because the vast majority of collective bargaining agreements contain mandatory arbitration procedures, petitioner does not raise an issue of sufficient general importance to warrant review.

The issue raised by petitioner is not one of general importance. A survey of CBAs conducted in 1983 found that arbitration is called for in 97 percent of the agreements surveyed. Ninety-six percent of these agreements

have provisions which specify the method by which arbitration is initiated. Ninety-one percent of these provisions provide that arbitration will be invoked at the request of either the employer or the union. In 9 percent of these agreements, arbitration automatically is the final step of the grievance procedure. Mutual agreement of the parties is required in *less than 1 percent* of the CBAs which specify the method by which arbitration is initiated. *Basic Patterns in Union Contracts* (BNA) 16 (10th ed. 1983). While this survey is somewhat out of date, it is unlikely that there has been a substantial change in the frequency of such clauses since the time of last publication.

Resolution of the issue presented here is, therefore, a matter of interest primarily to the parties involved. Few lawsuits in the lower courts will turn on resolution of this issue. Further, there is no need for a nationwide decision on the issue. Parties to CBAs can provide for mandatory arbitration in the negotiation process if the absence of such a clause is, to them, a defect. Thus, the decision of the court below does not warrant review. This case, therefore, does not present an issue of general importance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 89-3324

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

BRUCE W. FRYE

Plaintiff-Appellant

v.

U-BRAND CORPORATION; MICHAEL MCKIBBEN

Defendants-Appellees

BEFORE: MILBURN and BOGGS, Circuit Judges, and ENGEL, Senior Circuit Judge.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be and it hereby is affirmed.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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